

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

3
4 Equal Employment
Opportunity Commission

Case No. 14-cv-3408 (SRN/SER)

5 Plaintiff,

6 vs.

7 Cummins Power Generation, Inc.,
8 a division of Cummins, Inc.,St. Paul, Minnesota
Courtroom 7B
July 30, 2015
9:30 a.m.9 Defendant.
10

11 BEFORE THE HONORABLE SUSAN RICHARD NELSON

12 UNITED STATES DISTRICT COURT JUDGE

14 MOTION HEARING

23 Official Court Reporter: Heather Schuetz, RMR, CRR, CCP
24 U.S. Courthouse, Ste. 146
316 North Robert Street
25 St. Paul, Minnesota 55101

A P P E A R A N C E S

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1 P R O C E E D I N G S

2 IN OPEN COURT

3 (Commencing at 9:31 a.m.)

4 THE COURT: We are here this morning in the matter
5 of the Equal Employment Opportunity Commission and Grant
6 Habighorst versus Cummins Power Generation, Inc., a division
7 of Cummins, Inc. This is civil file number 14-3408. Would
8 Counsel please note your appearances.

9 MS. VASICHEK: For the EEOC, Your Honor, Laurie
10 Vasichek.

11 THE COURT: Good morning.

12 MS. KRUCKEBERG: For Cummins Power Generation, Jenny
13 Kruckeberg and Jacqueline Mrachek.

14 MR. TANICK: Morning, Your Honor. I'm Marshall
15 Tanick, and I represent the Plaintiff-Intervenor Grant
16 Habighorst.

17 THE COURT: I would like to disclose for the record
18 that I think I know all of you very well, so I don't know that
19 there's any problem here, but Mr. Tanick is a close personal
20 friend of the family. I've known Laurie for a long time.
21 I've known Jacqueline for a long time. I don't believe
22 there's any need to recuse here, but I felt the need to say
23 that for the record.

24 Does anyone have a concern about that?

25 MS. KRUCKEBERG: No, Your Honor.

1 MS. VASICHEK: No.

2 THE COURT: Okay. Very good. We are here today to
3 consider the Plaintiffs and the Plaintiff-Intervenor's motion
4 for judgment on the pleadings. Who wishes to go first?

5 Ms. Vasichek.

6 MS. VASICHEK: I will, Your Honor.

7 THE COURT: Okay.

8 MS. VASICHEK: Your Honor, this is a pretty
9 straightforward case. The EEOC has sued Cummins Power under
10 the ADA and GINA, arguing that authorization for the release
11 of medical records that it was using was overly broad. It
12 provided these to Grant Habighorst in connection with a
13 proposed fitness-for-duty exam. Mr. Habighorst objected to
14 them, saying they were overbroad. Cummins insisted that he
15 sign them, and when he didn't sign them because of the
16 over-breadth, he was fired. We're contending that those
17 overbroad releases were unlawful medical inquiries under the
18 ADA and that his -- and GINA, and that his termination was
19 retaliation under both statutes.

20 What we are here today is to seek to dismiss the
21 defense of Cummins Power that the authors of the releases, or
22 who they stated the authors of the releases are indispensable
23 parties under Rule 19. We've brought this motion under 12 --
24 Federal Rule 12(c). There are three different avenues under
25 which we could have brought this motion. We could have

1 brought this motion under 12(c), which we have, which is where
2 we're seeking judgment on the pleadings of that affirmative
3 defense. We could have also brought it under 12(f), which
4 allows us to move to strike. Under 12(f), more than 21 days
5 had passed before we had filed our motion, but the Court is
6 within its power to -- within its discretion to set those 21
7 days aside. That is the message that was in the *Aaron versus*
8 *Martin* case which we cite in our brief and which this Court
9 cited in its decision in *In re: RFC*.

10 The third way it could have been accomplished is
11 through a partial motion for summary judgment under Rule 56,
12 which is what Judge Doty did in the *EEOC versus the KFC* case.
13 We have selected to go under Rule 12(c) because it is the most
14 appropriate here. For one thing, it is no question about
15 timeliness. The only question about timeliness under 12(c) is
16 that it cannot delay trial. We are still in discovery, so it
17 will not delay trial. The other thing is that it has to be
18 something that the Court can decide as a matter of law. In
19 other words, there can't be any questions standing in the way.
20 It is the EEOC's contention that -- here that there are no
21 disputed facts and that as a matter of law, Cummins Power
22 simply cannot make this defense. This defense does not exist
23 in the context of this case.

24 First, in order to make even a facial showing under
25 Rule 19, Cummins Power would have to satisfy one of three

1 different -- one of three different standards. The first they
2 would have to show either that their interests would be
3 impaired; or second, that the interest of third parties would
4 be impaired; or third, that there would be multiple or
5 inconsistent judgments.

6 First, there is no manner here in which Cummins
7 Power or the EEOC will be -- whether the rights and
8 authorities under the statutes would be impaired by not having
9 the authors, so-called authors of the releases in this case.
10 The basic question under Rule 19(a), whether someone is a
11 required party, is, can full relief be provided absent that
12 party? And here, of course, full relief can be granted absent
13 the so-called authors. We have sued Cummins. Cummins is the
14 employer. It is Cummins who is the employer who is subject to
15 the obligations under the Americans with Disabilities Act. It
16 is Cummins who is subject to the obligations under the Genetic
17 Information Nondiscrimination Act. It is Cummins who is
18 responsible for not retaliating or interfering with the rights
19 of Mr. Habighorst under both statutes.

20 As a consequence, because complete relief can be
21 granted, there are no -- none of the necessary equities that
22 are involved in deciding whether someone is or is not a
23 required party. I'd also like to point out that there is no
24 way, under the statutes, that Cummins can argue that its
25 damages or its liability is shared by the third-party, the

1 authors. Now, as we have argued the facts of the case in --
2 are irrelevant here. What's important is the law. But
3 looking at things from the facts as asserted by Cummins and
4 accepting them for purposes of this argument, Cummins said
5 that its third-party provider, Cigna, drafted the
6 authorizations -- or another doctor, Pearson, drafted the
7 authorizations -- an other authorization.

8 Cummins said it went to Cigna after hearing the
9 objections of Mr. Habighorst and said, would you revise --
10 would you revise the release? And Cigna said no. Now,
11 assuming all that to be true, Cummins is still the one and
12 only proper Defendant here. That is the lessons of the *Norris*
13 case which we cite. In the *Norris* case, the employer was
14 offering an annuity for its employers, and it gave the
15 employees a laundry list of different annuity choices and
16 said, here, you can take one of these annuity choices.

17 But every single one in the list had a sex-based
18 annuity. Women and all of them were being paid less than men
19 and that's simply because that's what the market did, and so
20 they were sued. The employer was sued. The State of Arizona
21 was sued; and they defended by saying: Your Honor, it was out
22 of our hands. It was a third-party, these different annuity
23 companies, these insurance companies. It was their fault. We
24 had no choice. We just were letting our employees, with good
25 faith, access to that market.

1 And the Supreme Court said, no, too bad, we can't --
2 an employer can't defend by saying that, well, we couldn't do
3 it ourselves, a third-party can. By similar token, Cummins
4 cannot defend here by saying, well, we didn't do it ourselves,
5 but a third-party, Cigna, did. And we were able to fire our
6 employee for not filling out that form of the third-party. As
7 a consequence, there is no basis by which Cummins can seek to
8 share its liability in this case. Moreover, Cigna has no
9 interest in this case.

10 Now, Cummins may argue that Cigna has an interest in
11 this case because there may potentially be a lawsuit somewhere
12 down the road -- factual basis of which we don't know -- where
13 Cummins says to Cigna, you caused us to lose money in this
14 EEOC lawsuit. There are two problems with that. One is that
15 the law under the Rule 19 is explicit in both the Eighth
16 Circuit and within this Court. We laid out on Page 13, but
17 the rule -- the -- it basically says that the possibility of
18 future litigation is not an aspect that is of consideration
19 when determining whether or not someone's interests may be
20 impaired for purposes of Rule 19(a).

21 Second of all, we are dealing specifically in the
22 realm of employment discrimination and the statutes against
23 employment discrimination. Under those statutes, the Court --
24 the United States Supreme Court has been clear there is no
25 right for contributions, and there is no right for indemnity.

1 This case is the *Northwest Airlines versus Transport Workers*
2 case. This case arose out of an instance where Northwest
3 Airlines was sued for maintaining a discriminatory wage scale
4 for its flight attendants. The wage scale was set in a
5 Collective Bargaining Agreement with the Transport Workers.
6 Northwest Airlines said, well, basically, we lost, we were
7 sued for the sex-based payment schedule but you, Transport
8 Workers, you're also responsible.

9 And the Supreme Court said, you know, we're going to
10 assume everything is true. We're going to assume that all the
11 facts that would support a contribution case lie here. We're
12 also going to assume it would be very unfair for Northwest
13 Airlines to have to bear the burden of this judgment itself.
14 But the Supreme Court said there's still no right to
15 contribution. The statutes weren't adopted for the protection
16 of the employer, in that case Northwest Airlines. There is no
17 common law or implied right under the statutes to
18 contribution, and there is no common law right to it.

19 What was involved in that case that was Title VII
20 and the EPA. Similar courts -- the courts have held similarly
21 under the other statutes, including, I believe it's Judge
22 Kyle -- or -- either Judge Kyle or Judge Doty held it under
23 the ADEA. We put case law in under the ADA. GINA is the
24 same. The statutes were adopted for the protection of the
25 employees, not for the employer. There is no implied right.

1 It's a complex statutory scheme, and the -- both GINA and the
2 ADA have the same enforcement provisions as Title VII.
3 They're incorporated. The final element is whether or not
4 there will be inconsistent judgments. We have not heard any
5 argument from Cummins that there would be any. Therefore,
6 this provision doesn't apply.

7 In total, Your Honor, there is no basis for which
8 Cummins to argue that the authors of these releases are
9 indispensable parties here. The indispensable party is
10 already a Defendant, and that is Cummins.

11 Thank you very much.

12 THE COURT: Thank you.

13 Mr. Tanick, do you wish to be heard?

14 MR. TANICK: Yes. Thank you, Your Honor, I'll be
15 very brief. It's kind of a "me too" position. We agree with
16 the EEOC's position and support it. Just a couple points I
17 want to emphasize, and as Ms. Vasichek indicate, it's the
18 employer who under the law is culpable and potentially liable
19 for any transgressions. The employer has control over its
20 agents. And it is not necessary or required or even prudent,
21 necessarily, to bring -- to expand the litigation like this by
22 suing agents of the employer.

23 I think that one way to look at it is Cigna and the
24 doctor involved may well be witnesses in this case. They may
25 have evidence that's of value to either side, but they're

1 certainly not parties that have to be brought into this case.
2 And under Rule 19, indispensable party status means if they're
3 not brought in the case, the Court lacks jurisdiction. So, in
4 a sense what Cummins is asserting is that we can't proceed
5 with this lawsuit without these individuals, Cigna and the
6 doctor in the case, and that's just wrong. It's bad law, it's
7 bad policy. These folks are witnesses, not parties.

8 Thank you.

9 THE COURT: Thank you.

10 Ms. Kruckeberg, am I saying that right?

11 MS. KRUCKEBERG: It's Kruckeberg, Your Honor.

12 THE COURT: Kruckeberg, okay.

13 MS. KRUCKEBERG: Thank you.

14 Good morning, Your Honor. My name is Jenny
15 Kruckeberg, and I'm here with Jacqueline Mrachek. We
16 represent the Defendant, Cummins Power Generation.

17 We're here before you on the motion by the Plaintiff
18 EEOC and Plaintiff-Intervenor Grant Habighorst to dismiss one
19 of the Defendant's affirmative defenses: Failure to join
20 indispensable party based on their motion for judgment on the
21 pleadings. I just want to point out at the very beginning, I
22 feel as though the EEOC and Plaintiff-Intervenor have been
23 arguing that Cummins has brought a motion for failure to join
24 an indispensable party, and that's not the procedural posture
25 of why we're here today.

1 We are here regarding whether it is appropriate at
2 the beginning stages of the litigation for Cummins to be able
3 to plead the indispensable party's defense as discovery
4 continues in this case. I'd like to give Your Honor a little
5 bit more background facts that I feel as though the EEOC
6 really glossed over to kind of show why Cigna and Dr. Pearson,
7 the two entities named by the EEOC, really do have central
8 roles in this case that have not entirely yet been made clear
9 what their roles are.

10 So, Cummins hired the Plaintiff, Grant Habighorst,
11 as a business analyst on August 6th of 2012. Within the first
12 few short weeks of his employment, Mr. Habighorst made
13 references to guns and to violence. He soon afterwards wrote
14 an extremely disturbing four-page letter to one of his
15 supervisors, again making references to guns and violence, as
16 well as referencing very disturbing behavior and delusions
17 that he exhibited in the workplace. This behavior was so
18 disturbing to Cummins that Cummins was appropriately and
19 immediately concerned, on receipt of the letter, for the
20 safety of not only its workforce and Mr. Habighorst's
21 coworkers but Mr. Habighorst, as well --

22 THE COURT: I don't think the EEOC disagrees with
23 that. I mean, I think the EEOC assumes that's the case and
24 that he should be subject to some sort of fitness-for-work
25 exam.

1 MS. KRUCKEBERG: Absolutely, Your Honor, and that's
2 a great point. And the next thing I was going to acknowledge,
3 that the EEOC and Mr. Habighorst himself have even conceded
4 that this behavior was so scary, it was appropriate to remove
5 him from the workplace pending this fitness-for-duty exam.

6 But I think that really sets us up for showing how
7 Cigna and this Dr. Pearson really are the authorizations --
8 excuse me, the authors of the authorizations to which the
9 Plaintiffs have objected, and this shows how their roles are
10 so central to this case --

11 THE COURT: And I don't think the EEOC disagrees
12 with that either. I think it's a legal question. I mean, I
13 think -- I don't think -- I think they say, Judge, you can
14 assume all of that is the case. The question I think comes
15 down to whether Cummins says, hey, Cigna, you're subjecting us
16 to liability here, you're fired; or whether they say to Cigna,
17 okay, we give, we'll live with what you're requiring of us
18 even if it subjects us to a lawsuit. You know, what do you do
19 when a vendor like that who takes full responsibility for what
20 is alleged to be illegal says, that's how we do it. The
21 question is, how do you as Cummins handle that? And perhaps
22 the way to handle that is to fire the vendor and hire a new
23 vendor, but --

24 MS. KRUCKEBERG: Right. Absolutely. I appreciate
25 your points you're making, Your Honor, and that's absolutely

1 correct. So, let me move on to the merits of their argument,
2 with some of those background facts about the role of
3 Dr. Pearson and Cigna.

4 Again, why we're here today is that Defendant
5 Cummins Power Generation pled, included in his Answer, pled
6 the defense of failure to join an indispensable party because
7 at the outset of the litigation, again, we knew we did not
8 write either one of these forms. These are the forms which
9 the EEOC has objected; and based the lawsuit, and we needed
10 the opportunity and we believe that the Plaintiffs needed the
11 opportunity, as well, throughout discovery to determine more
12 facts about what the communications are between, for example,
13 the parties and the parties that are not joined here --

14 THE COURT: But why would that -- why would that
15 matter, you see? I think what the EEOC is saying is you can
16 assume all the facts as you've alleged are true. This is a
17 legal question. There aren't -- there aren't any other facts
18 to develop before a summary judgment motion on this
19 affirmative defense because, as a matter of law, it fails.

20 MS. KRUCKEBERG: Right.

21 THE COURT: So why do you think that's not true?
22 Why do you think that the law requires us to make some
23 findings of fact before we determine whether you can assert
24 that defense?

25 MS. KRUCKEBERG: Great question, Your Honor. I

1 think that, as we've talked about under Rule 12 motion, the
2 Court needs to consider whether complete relief can be
3 afforded among the existing parties or whether it is
4 appropriate to exercise the Court's power to dismiss an action
5 if a party could not be joined. So, when we're looking at
6 Cigna and Dr. Pearson here, I think it is critical to point
7 out there is no evidence in the record that Cigna or
8 Dr. Pearson were agents of Cummins. Dr. Pearson was actually
9 never engaged by anyone in this -- in this case. He simply
10 sent a form to Grant Habighorst that Cummins had no knowledge
11 of that was even being sent, and then he quickly withdrew from
12 the process before he was ever involved --

13 THE COURT: But the facts are that -- I mean, tell
14 me if I'm wrong. He didn't come out of the blue. Cummins
15 uses Cigna for these purposes. You must have some contract
16 with them, and Cigna presumably uses physicians or whatever
17 and pursuant to that contract, Cummins sent this case to Cigna
18 and so they're a vendor or a -- I mean, there is a contractual
19 relationship there and Cigna said you have to -- you have to
20 sign this release. And Mr. Habighorst said no and he went
21 back to Cigna and said, can't you change it? And Cigna said
22 no. And the question is at that point, legally, what is
23 Cummins responsibility?

24 MS. KRUCKEBERG: Right. First I would just point
25 out again, Your Honor, that it has not been established and

1 there's no facts in the record to show that Cigna is
2 appropriately our agent. And that agency relationship under
3 the law, I think --

4 THE COURT: I think you say in your brief just what
5 I said, that you hired Cigna for this purpose.

6 MS. KRUCKEBERG: Absolutely. So, we have a
7 contractual relationship with Cigna. That, I would argue,
8 does not necessarily make them our agent under the law,
9 certainly with respect to any control that we would have over
10 forms that we did not write, that we do not control --

11 THE COURT: I don't think that matters here, you
12 see, because the question is what Cummins' reaction is to
13 this. And Cummins' reaction was to fire him for failure to
14 follow the rules that Cigna had. Right?

15 MS. KRUCKEBERG: I disagree with that, Your Honor,
16 respectfully --

17 THE COURT: Why did Cummins fire him?

18 MS. KRUCKEBERG: I'm not sure whether this is
19 precisely what -- the issue that's before the Court, but I
20 definitely want to provide some explanation with regard to
21 that. So, Mr. Habighorst worked for us for less than two
22 months. He was out on a fitness-for-duty exam process for
23 almost four months. The entire time he is refusing to
24 cooperate with us whatsoever. We --

25 THE COURT: Well, he's refusing to cooperate with

1 Cigna, isn't he? He's refusing to sign the authorization that
2 Cigna is asking him to sign.

3 MS. KRUCKEBERG: Actually, that's not entirely true.
4 Yes, initially he did not want to sign the Cigna authorization
5 form. We had back-and-forth dialogue with him about that
6 form, answering his questions. We, upon his request that we
7 fill in the name of the third-party doctor who would be
8 receiving that information, we modified that form, sent it
9 back to him. He still had a problem with it. I will also
10 note for the Court this entire time he's surreptitiously
11 recording all these conversations with our personnel,
12 unbeknownst to us. In the correspondence that he's sending
13 us, he is misconstruing guidance that we are giving him about
14 the process and his ability to find out more information.

15 So, I would -- I would say, in addition, once he --
16 it became clear he wasn't interested in this Cigna process, we
17 again tried to work with him and we said, we'll research
18 another doctor; if there's another doctor that you want to go
19 to that you'd be more comfortable with, you could have an
20 authorization form that you believe is more appropriately
21 tailored to this according to your specifications, we
22 absolutely did that. And we worked with him. And so it's not
23 just that he did not sign that Cigna authorization form --

24 THE COURT: Okay.

25 MS. KRUCKEBERG: This process occurred over a period

1 of four months. The --

2 THE COURT: But you want to bring in Cigna because
3 you think they're responsible for an illegal form. Why do you
4 want to bring in Cigna --

5 MS. KRUCKEBERG: Again, Your Honor, I want to make a
6 fine distinction there. Cummins is not saying we want to
7 bring in Cigna. We've not made that motion --

8 THE COURT: You have alleged failure to add an
9 indispensable party. I know you haven't made the motion, but
10 you've made the allegation. And so it's fair to look at
11 whether we can resolve that allegation now or whether we need
12 facts before they bring a summary judgment motion --

13 MS. KRUCKEBERG: Absolutely.

14 THE COURT: -- and so I'm just trying to get back to
15 the point here. What facts will change the law about this? I
16 mean, the law seems pretty clear that there's no right of
17 contribution and that Cigna's presence is not indispensable.
18 So, what facts will change my mind on that?

19 MS. KRUCKEBERG: Right. I do not believe that the
20 law is clear with respect to contribution. GINA, as we know,
21 is a fairly new statute, enacted in 2009. The Supreme Court
22 precedent that the EEOC is citing to is from the 1980s. I
23 don't believe it's established at all in case law that there
24 is no possibility for contribution under any set of disputed
25 facts with respect to a third-party vendor or, again, a

1 third-party that was never engaged by us. As discovery is
2 proceeding -- we have about three months or so left in
3 discovery -- we are determining facts about what the
4 communications were between the parties and what the
5 communications were between, for example, Grant Habighorst and
6 Cummins or Dr. Pearson that we had no knowledge of --

7 THE COURT: But I guess the question is, let's
8 assume all those facts come out in your favor. Why is it
9 that -- that Cigna is indispensable here when the law seems to
10 suggest in the *Norris* case, you can't blame that third-party;
11 you have to take responsibility for your actions. Why do you
12 distinguish this case, for instance, from *Norris*?

13 MS. KRUCKEBERG: Right. And as the EEOC
14 acknowledges, when we're looking at Rule 19, we're not only
15 looking at whether the third-party's interest is impaired, but
16 we're also looking at whether our interests are impaired. We
17 are also looking at whether there is any necessary -- if, in
18 fact, there were to be found liability in this case which, of
19 course, Cummins does not believe is warranted, whether it
20 would be appropriate for some of that liability to be
21 apportioned to either Cigna or --

22 THE COURT: So it comes down to contribution
23 indemnity and you're arguing that the Supreme Court law on
24 contribution doesn't apply to GINA. Indemnity can happen at a
25 future date. If you have some indemnity provision in your

1 contract, you can sue Cigna at a future date. But under the
2 law of Rule 19, that doesn't preclude this case from going
3 forward, does it?

4 MS. KRUCKEBERG: Well, I think that the Supreme
5 Court precedent is also well established that Rule 19
6 inquiries are highly fact-dependent. And so I would argue at
7 this stage in the case, it has not been established that there
8 is no set of facts under which it's possible that if there
9 were to be liability apportioned, that some of that could not
10 be appropriately determined to be Cigna's responsibility
11 and/or possibly Dr. Pearson's.

12 The EEOC's motion at this point is premature, I
13 would argue. The facts have not been well established in this
14 case. And at the time that Cummins pled the defense, again,
15 Cummins did not even have an obligation to plead this defense.
16 This defense, pleading it in the Answer stage, gave them
17 notice that this is an issue that's out there. We've got
18 these two additional parties, and is this going to be harm to
19 Cummins for the fact that neither one of these forms were
20 created by us? One of them was sent out without our
21 knowledge. Is that appropriate to say that there's no set of
22 facts under which those parties could potentially have any
23 responsibility that could come out in this case; and to
24 preclude Defendant's ability to be able to raise that motion,
25 were it to become appropriate based on the facts, and to

1 demonstrate at this point there's no potential disputed fact
2 given all of the inferences that are appropriate in Cummins'
3 favor at this point, I would argue is not appropriate at this
4 stage, Your Honor.

5 THE COURT: Thank you.

6 MS. KRUCKEBERG: Thank you.

7 THE COURT: Brief response?

8 MS. VASICHEK: Just briefly, Your Honor. As the
9 EEOC has argued, we don't care what the facts are. The facts
10 are everything they want it to be. This is still a matter of
11 law. There is no indispensable party here. I also, however,
12 want to note that to the extent the facts exist, they have to
13 be known by Cummins. Cummins on Page 10 argues about what
14 additional facts they need. They say they need to have
15 additional facts about the type of relationship that Cummins
16 has with the authors: Information in their hands.

17 They say they need information relating to
18 representations made by the authors of the authorizations to
19 Cummins: Already information in their hands. They say that
20 they need more facts regarding communications, documentations,
21 and instructions between Defendant, Cummins, and the authors:
22 Already in its hands. And then finally it says any
23 communications and representations made directly by the
24 authors to Mr. Habighorst, whose deposition has been taken,
25 whose answered interrogatories and answered document requests.

1 So, to the extent there is any facts, they should be
2 known. And to the extent that they have implied any facts, we
3 assume them to be true. And nevertheless, this case -- the
4 affirmative defense that we have failed to join indispensable
5 parties should be dismissed. Thank you.

6 THE COURT: Thank you.

7 Brief response from Cummins?

8 MS. KRUCKEBERG: Two points I wanted to raise
9 quickly, Your Honor.

10 I think there's two things that we need to keep in
11 mind, and the real question that we're looking at here is two
12 prongs. One, whether the release is on its face a violation
13 of the ADA or GINA. And two, we want to be looking at is
14 whether there was any adverse action against Mr. Grant
15 Habighorst. And it's important that those are two distinct
16 questions, and Cummins is not disputing that whether there was
17 any wrongful termination with regard to Mr. Habighorst is the
18 responsibility of -- of Cummins.

19 However, it is appropriate to keep in mind that that
20 first prong is an entirely separate question, and I would
21 again point out to Your Honor that these forms that again,
22 one, we never even saw; and two, the one that we did not
23 author, it's not appropriate to show that Cummins can be
24 entirely liable for those forms at this point.

25 THE COURT: Thank you. Very good.

This matter will be taken under advisement. And court is adjourned.

(WHEREUPON, the matter was adjourned.)

(Concluding at 10:02 a.m.)

* * * *

CERTIFICATE

I, Heather A. Schuetz, certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

Certified by: s/ Heather A. Schuetz
Heather A. Schuetz, RMR, CRR, CCP
Official Court Reporter